2010

State of Utah v. Jennilue Crosby Larsen : Brief of Appellee

Utah Court of Appeals

Case No. 20100473-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Jennilue Crosby Larsen,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for five counts of theft of a firearm, all second degree felonies, in the Eighth Judicial District Court of Utah, Duchesne County, the Honorable Edwin T. Peterson presiding.

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for five counts of theft of a firearm, all second degree felonies. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2009).

STATEMENT OF THE ISSUE

Should Defendant's five convictions for theft of a firearm have merged into a single conviction because the firearms were taken at the same time from the same place?

Standard of Review. No standard of review applies to this issue because it was not preserved for appeal, and Defendant fails to argue any exception to the preservation requirement. *See State v. Patrick*, 2009 UT App 226, ¶ 11, 217 P.3d 1150

(an appellate court does not address arguments not preserved below), *cert. denied*, 225 P.3d 880 (Utah, Jan. 20, 2010).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

There are no determinative constitutional provisions, statutes, or rules.

STATEMENT OF THE CASE

Defendant was charged with five counts of theft of a firearm, all second degree felonies, in violation of Utah Code Ann. §§ 76-6-404 (West 2010) and 76-6-412(1)(a)(ii) (West Supp. 2011). R. 6-8. Each of the five guns was taken from the same place at the same time. R. 6-8. Following a one-day trial, a jury convicted her as charged. R. 91-95. The trial court sentenced Defendant to five concurrent sentences of one-to-five years in the state prison, suspended all but 30 days of the sentences, and placed her on thirty-six months probation. R. 205-07, 209, 214-18. Defendant timely appealed. R. 199-200.

STATEMENT OF FACTS

Seventeen-year-old Ashley Crowley lived with her father Russell in Ioka, Utah. R. 231:98-99, 106, 109, 137. On entering the house they shared on January 20, 2009, Ashley immediately noticed that a closet door in the living room was standing open and the kitchen drawers visible from near the front door were open. R. 231:99-100, 102-04. Because she had been the last to leave the house that morning and was the first to return home, she believed that someone had been there while she was

gone. *Id.* Neither she nor her father noticed that anything was missing at that time. R. 231:104-05, 112. However, as the two were getting ready to go hunting a couple of days later, they discovered that five guns were missing from Russell's bedroom. R. 231:100-02, 105, 112, 135. Two of the guns belonged to Ashley and three belonged to her father. R. 231:100-02, 105, 112, 130-32, 134-35. They did not immediately report the missing guns to the police, however, because Russell believed that Defendant had them. R. 231:113, 133.

Russell Crowley had a "pretty serious" relationship with Defendant for "almost four years" before it ended in March of 2009. R. 231:109. Shortly before the guns were stolen, the two got into an argument because Russell missed a dinner date with her to go hunting with his friend and her ex-boyfriend Tim without telling her. R. 231:110-12. Approximately two weeks later, the guns were found missing. R. 231:113.

A few days later, Russell and Defendant "were having a good evening" when he mentioned that he would "sure like to know where [the guns] were at." R. 231:113-14. Defendant responded, "[W]ell, I've got them, because now you'll start spending time with me instead of Tim." R. 231:114. Russell saw the guns numerous times in Defendant's bedroom partially under a blanket by her bed and believed they were still there when their relationship ended in mid-March. R. 231:114-15, 132-33, 137-39. He did not take the guns back, however, because he hoped that she

would live up to her promise to give them back, thereby preventing further damage to their relationship. R. 231:114-15.

A major rift occurred in the relationship in mid-March when Russell arrived at Defendant's home unannounced and found another man with Defendant. R. 231:115-16. The next day, Defendant sent Russell a text message saying, "Come get your guns." R. 231:115-20. Russell immediately headed to Defendant's home, only to get a phone call from her when he was halfway there. R. 231:120-21. During the heated conversation, she told him not to come or she would call the police. *Id.* Consequently, he did not go, and he never got his guns back. R. 231:121-22, 222. He reported them stolen a day or two later. R. 231:133.

Officer Deila Rowley investigated the reported theft. R. 231:139-41. As part of her investigation, she interviewed both victims and Defendant. R. 231:141, 144. She also received a witness statement from Defendant stating that she did not have "any items that belong" to Russell and claiming that he was harassing her son and her friends. R. 231:142. Officer Rowley obtained a search warrant for Defendant's home, but no guns were found. R. 231:146.

Defendant was the sole witness for the defense. R. 231:3, 149-212, 231-34. She admitted sending Russell a text message telling him to come and get his guns, but denied ever having the guns, ever speaking to him about either the guns or the theft prior to March 16, ever inviting him to a dinner he missed because he went hunting,

and ever fighting with him about it. R. 231:153, 162-64, 167-69, 193. Instead, she claimed that Russell was responsible for their break-up in March, that he harassed her, her son, and her mother, and that she sent him the text message telling him to come and get his guns because by agreeing with his claim that she had them she thought he would "go away" and leave [her] alone[.]" R. 231:159-63, 165-66, 201-04.

SUMMARY OF ARGUMENT

This Court should decline to reach Defendant's claim that her five theft convictions should have merged into a single second-degree felony conviction. Defendant did not raise a merger claim in the trial court, and she fails to argue any exception to the preservation requirement in order to permit appellate review of her claim. Further, her assertion that the trial court *sua sponte* raised the issue lacks record support. Finally, her argument violates this Court's briefing requirements, permitting its summary rejection.

ARGUMENT

DEFENDANT ARGUES NO BASIS UPON WHICH TO OBTAIN APPELLATE REVIEW OF HER UNPRESERVED MERGER ARGUMENT; FURTHER, THE ARGUMENT IS INADEQUATELY BRIEFED ON ITS MERITS, JUSTIFYING ITS REJECTION

Defendant claims that the doctrine of merger applies in this case to bar her conviction for more than a single offense because all five guns were stolen at the same time from a single location. *See* Aplt. Br. at 3-4. This Court need not reach the

merits of her claim, however, because she failed to preserve it for appellate review. *See State v. Prawitt*, 2011 UT App 261, ¶ 13, 688 Utah Adv. Rep. 33. In any event, the claim does not warrant review because it is inadequately briefed.

A. The Claim is Unpreserved

"As a general rule, claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. "'Utah courts require specific objections in order to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate.'" *State v. Meza*, 2011 UT App 260, ¶ 4, 688 Utah Adv. Rep. 50 (quoting *State v. Hardy*, 2002 UT App 244, ¶ 14, 54 P.3d 645 (internal quotation marks omitted)). To preserve an issue for appellate review, "'the issue must be sufficiently raised to a level of consciousness before the trial court and must be supported by evidence or relevant legal authority,'" *Prawitt*, 2011 UT App 261, ¶ 13 (quoting *State v. Dean*, 2004 UT 63, ¶ 13, 95 P.3d 276 (internal quotation marks omitted)). A defendant can preserve a merger issue in the trial court by objecting " 'either during trial, or following the conviction on a motion to vacate.' " *State v. Wareham*, 2006 UT App 327, ¶ 28, 143 P.3d 302 (quoting *State v. Lopez*, 2004 UT App 410, ¶ 7, 103 P.3d 153) (additional citation omitted).

Defendant contends that the merger issue "was raised sua sponte by the [trial] court[,]" thereby preserving it for direct appeal. Aplt. Br. at 1 (citing R. 231:13, 108).

However, neither of the record citations she provides supports her preservation claim. The first citation involves the judge's pre-trial discussion with counsel about the jury instructions. R. 231:13. After establishing an acceptable phrasing of the intent requirement for the elements instructions, the judge asked counsel if they agreed with the giving of "five instructions on the same exact elements[,]" prompting the following exchange:

[PROS]	Your Honor, it doesn't matter to me. I separated them out for clarity.
THE COURT:	Oh, no.
[PROS]	I thought we did.
THE COURT:	[Defense counsel], what do you think about that?
[PROS]	Because I know [defense counsel] is also going to ask that the jury verdict forms be specific -
[DEF. COUNSEL]	Be specific.
[PROS]	-- to each gun as well.
THE COURT:	I'm okay with it. I think that's appropriate because you have independent charges. Now, this all is alleged to have happened on the same date?
[PROS]	Same date, same time.
THE COURT:	And, you know, not to get down the road too far, but I suppose there would be an issue of merger as far as the sentencing in the matter is concerned. But that's a bridge we can cross when we get to it. Do you want me to give five instructions that are exactly the same or -

[PROS] Well, they are not exactly the same because they each contain a different firearm that was stolen. There were five separate firearms stolen.

THE COURT: Okay. Smith - okay. You are right. . . .

R. 231:12-13. The judge raised the issue of merger during this exchange, but only in the context of sentencing, which is not how Defendant argues it on appeal. *See* Aplt. Br. at 3-4. Further, the judge explained that his merger concern was premature and, hence, did not address it further but presented it for later consideration. He did not raise the issue again.

The mere mention of the possibility of a merger issue is not sufficient to preserve the issue for appeal. *See State v. McDaniel*, 2010 UT App 381, ¶¶ 3-4, 246 P.3d 162. Also telling is the absence of any response by defense counsel to the judge's characterization of the five charges as "independent charges." R. 231:13. Finally, following presentation of all the evidence, Defendant's counsel approved the giving of five separate elements instructions without expressing any concern for merging them. R. 231: 226-30.

Defendant also points to page 108 of the trial transcript as the second of two points at which the trial judge raised the merger issue. *See* Aplt. Br. at 1. However, no discussion or mention of merger appears on or around that page of the transcript.

Where the record does not reflect that the merger issue was timely raised below by either the parties or the district court, the issue was not preserved for appellate review. *See State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551, *reh'g denied* (June 1, 2005). Consequently, this Court should consider the issue only if it qualifies under an exception to the preservation requirement. *See generally State ex rel. D.V.*, 2011 UT App 241, ¶ 9, 687 Utah Adv. Rep. 35; *see also State v. Cram*, 2002 UT 37, ¶ 4, 46 P.3d 230 ("[T]he exceptions to the preservation rule ... include plain error, exceptional circumstances, [and] ineffective assistance of counsel.") (citing *Holgate*, 2000 UT 74, ¶ 11). Because Defendant fails to argue on appeal that the issue may be addressed for the first time under any of the exceptions, this Court should decline to consider the merits of her merger claim. *See State ex rel. D.V.*, 2011 UT App 241, ¶ 9 (declining to consider the merits of D.V.'s hearsay claims where they were not preserved in the trial court and D.V. failed to argue any exception to the preservation requirement on appeal).

B. The Claim is Inadequately Briefed

Moreover, the argument presented by Defendant is inadequately briefed. "'An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.'" *See State v. Smith*, 2010 UT App 231, ¶ 3, 238 P.3d 1103 (quoting *State v. Sloan*, 2003 UT App 170, ¶13, 72 P.3d 138). Appellate courts have routinely declined to review the merits of

claims so inadequately briefed as to require the court to bear the "burden of argument and research[.]" *See West Jordan City v. Goodman*, 2006 UT 27, ¶ 29, 135 P.3d 874 (citation and internal quotation marks omitted); *State v. Green*, 2005 UT 9, ¶11, 108 P.3d 710; *State v. Chrisman*, 2011 UT App 189, ¶ 7, 257 P.3d 1083 (refusing to review claim where defendant failed to identify and apply appropriate law).

Here, Defendant's claim is inadequately briefed because she fails to identify and apply the relevant statutory authority applicable to her merger claim. *See* Utah R. App. P. 24(a) (attached in **Addendum A**). She simply relies on a case more than one hundred years old and, based thereon, claims a right to merger of her five convictions to a single one. *See* Aplt. Br. at 3-4 (citing *State v. Mickel*, 23 Utah 507, 65 P. 484, 485 (Utah 1901)). Her cursory treatment of that case wrongly implies that the case is on all fours with the present case. In *Mickel*, the defendant challenged the trial court's overruling of his demurrer to an indictment charging him with grand larceny for stealing twenty mares and three horses that were owned by different individuals but were taken from the same place. 65 P. at 483-85. Mickel claimed that the indictment improperly charged him with more than one offense. *See id.* at 485. The appellate court disagreed, holding that, as written, Mickel was indicted on "but one larceny, one transaction." *Id.* The court rejected Mickel's claim that inclusion of the names of the multiple owners or the numbers of mares and horses stolen charged multiple transactions. *See id.*

Here, the Information clearly charged five distinct crimes, each based on the theft of a different gun. R. 6-8. This is in keeping with the post-*Mickel* statutory scheme under which the present thefts were prosecuted. Utah law generally allows merger of multiple convictions under three circumstances: (1) through the "judicially crafted" merger doctrine, which protects against "violations of constitutional double jeopardy protection" (*State v. Smith*, 2005 UT 57, ¶ 7, 122 P.3d 615); (2) through the merger test set forth in *State v. Finlayson*, 2000 UT 10, ¶ 23, 994 P.2d 1243, which applies when a defendant has been convicted of both kidnapping and another crime in which detention was inherent (*see generally State v. Lee*, 2006 UT 5, ¶¶ 27-31, 128 P.3d 1179); and (3) through the statutory merger authorized by Utah Code Annotated § 76-1-402 (West 2004). Defendant makes no mention of these circumstances or of the statutory scheme governing theft prosecution, which scheme is determinative of her argument. Instead, she completely ignores section 76-1-402, which permits the State to charge a defendant with violating the same provision of the Utah Code multiple times, as was done here. *See* Utah Code Ann. § 76-1-402(1) & (2) (attached in **Addendum B**). The statute's only restriction is that a single act in a single criminal episode can only be punished under one provision of the Utah Code. *See* Utah Code Ann. § 76-1-402(1). The State made no such allegation in this case.

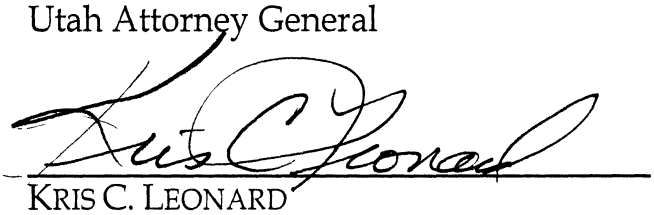
As a result of Defendant's cursory and inadequate argument, analyzing the merits of her claim would require this Court to bear the "burden of research and argument," which it should refuse to do. *See Smith*, 2010 UT App 231, ¶ 3.

CONCLUSION

For the foregoing reasons, the Court should affirm Defendant's convictions.

Respectfully submitted October 18th, 2011.

MARK L. SHURTLEFF
Utah Attorney General



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Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on October 18, 2011, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

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A digital copy of the brief was also included: ☒ Yes ☐ No

Melissa Fryer

Addenda

Addendum A

Utah R. App. P. 24. Briefs

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of

the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person,' "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combina-

tion exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies

shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Addendum B

Utah Code Annotated § 76-1-402 (West 2004) Separate offenses arising out of single criminal episode—Included offenses

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and
(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of

conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.